91-294

No.

Supreme Court, U.S.
FILED
AUG 19 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC.,

Petitioner,

v.

STATE OF MARYLAND, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LESLIE ROBERT STELLMAN,
Counsel of Record
for Petitioner,
JOHN W. KYLE,
LITTLER, MENDELSON, FASTIFF & TICHY,
The World Trade Center, Suite 1653,
Baltimore, Maryland 21202-3005,
WALTER H. RYLAND,
WILLIAMS, MULLEN, CHRISTIAN & DOBBINS,
Two James Center,
1021 East Carey Street,
Richmond, Virginia 23210-1320.

August 19, 1991

The Daily Record Company
11 East Saratoga Street, Baltimore, MD 21202—(301) 752-3849

I

QUESTIONS PRESENTED FOR REVIEW

1. Should the Court of Appeals have dismissed Petitioner's case as moot because, during the pendency of Petitioner's appeal from the District Court's dismissal, on standing grounds, of its constitutional challenge to the provisions of the Maryland Annotated Code, State Finance and Procurement Article §§ 14-301 et seq. (herein the Minority Business Enterprise or "MBE" statute), that state's legislature repealed and reenacted the challenged statute with facial modifications?

2. Should the Court of Appeals have rendered an opinion finding that Petitioner lacked standing to initiate this litigation, while at the same time vacating the District Court's opinion and order to the same effect and remanding the case with

directions to dismiss on mootness grounds under United States v. Munsingwear, 340 U.S. 36 (1950)?

3. Were the facts set forth in a letter incorporated into deposition testimony offered by the Respondent sufficient to defeat its Motion for Summary Judgment on standing?

4. Does the Petitioner Association lack standing under the third prong of the representational standing test set forth in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), to attack the constitutionality of the Maryland MBE statute, because certain of Petitioner's members are MBEs within the meaning of the statute and may utilize its provisions to their economic advantage?

5. Is the personal stake necessary for representational standing under Article III of the Constitution and the first prong

of the Hunt test to challenge the maintenance of the Maryland MBE statute met by a showing that the allegedly unconstitutional subcontracting provisions of the statute are imposed directly upon Petitioner's members, impede their right to operate their business free from arbitrary governmental restraints, and subject them to the threat of liability for participation in state-sponsored racial discrimination?

II

LIST OF PARTIES TO PROCEEDING BELOW

Plaintiff

The Maryland Highways Contractors Association, Inc.

Defendants

State of Maryland

James J. McGinty, Secretary, Board of Public Works

Earl F. Seboda, Secretary, Department of General Services

Richard H. Trainor, Secretary, Department of Transportation

Joseph I. Shilling, Chairman, Interagency Committee on School Construction

Henry L. Hein, Chairman, Maryland Food Center Authority

Herbert J. Belgrad, Chairman, Maryland Stadium Authority

John S. Toll, Chancellor, The University of Maryland System

Charles L. Benton, Director, Department of Budget and Fiscal Planning

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Statutes

Regulations

Other Sources

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC.,

Petitioner,

v.

STATE OF MARYLAND, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

V

OPINIONS BELOW

The District Court opinion was issued on June 19, 1990 and is unreported. The opinion is reproduced in the appendix to this petition at App. A-30. The Court of Appeals' opinion is reported at 933 F.2d 1246 (4th Cir. 1991), and is also reproduced in the appendix at App. A-1.

VI

JURISDICTION OF THIS COURT

The Court of Appeals' opinion in this matter was rendered on May 20, 1991, and this petition has been timely filed under the provisions of Rule 13 of the Rules of this Court. Jurisdiction to hear and decide this matter is conferred by 28 U.S.C. § 1254(1)(1991).

VII

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provision

Amendment XIV, Constitution of the United States:

> Section 1. Citizens of the United States.
>
> * * *
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Statutes

a. 42 U.S.C. § 2000d (1981). Nondiscrimination in federally assisted programs.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

b. 42 U.S.C. § 1983 (1981).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United states or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Maryland Statutes and Regulations

The provisions of Md. State Fin. & Proc. Code Ann. §§ 14-301 through 14-303 (1985), as well as the relevant provisions of Title 21 of the Code of Maryland Regulations (COMAR) are lengthy and are reproduced at App. A-71.

VIII

STATEMENT OF THE CASE

Petitioner Maryland Highway Contractors Association, Inc. initiated this action in August 1989 in the United States District Court for the District of Maryland. Petitioner sought, inter alia, a declaratory judgment that certain provisions of the Maryland Minority Business Enterprise (MBE) statute, Md. State Fin. & Proc. Code Ann. § 14-301 et seq. (1985), constituted a scheme of impermissible race discrimination, violative of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983 and 42 U.S.C. § 2000d. In its Complaint, Petitioner relied upon this Court's opinion in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), and its holding that before a state may put in place a program of racial classification in

procurement it must first have a strong evidentiary basis for concluding that racial discrimination has occurred in State contracting programs and that a scheme of racial preference is necessary to remedy such discrimination.

On September 6, 1989, Respondent requested leave to postpone its response to Petitioner's Motion for Preliminary Injunction until further order of the Court, pending discovery in connection with Respondent's allegation that Petitioner lacked standing to bring the lawsuit. The District Court granted the request, with the result that the requested discovery, in the form of interrogatories and requests for production of documents, was begun concurrently by Respondent.

Petitioner served its responses to Respondent's discovery requests on October 10, 1989. In the interim, Respondent,

through the Maryland Department of Transportation, had published a solicitation in which it sought an independent consultant capable of performing a "Minority Business Utilization Study" to review and evaluate Respondent's MBE programs. The solicitation noted that time was of the essence, that an expedited method of procurement had been approved, and that the resulting study was to be completed not later than January 1, 1990.

Following service of Petitioner's answers to Respondent's interrogatories and document requests, Respondent noticed the deposition of Petitioner's Executive Director, Robert E. Latham. Mr. Latham's deposition took place on October 31, 1989, and on November 21, 1989, Respondent moved for summary judgment on a number of issues of justiciability, including Petitioner's alleged lack of standing to sue. Peti-

tioner opposed the motion in responsive papers filed with the Court.

A hearing, limited by order of the Court to the standing issue, was held before the District Court on February 7, 1990. Following the hearing, during the time that the Court had the matter under advisement, the General Assembly of Maryland relying, in part, upon the aforementioned study of the State's MBE programs, repealed and reenacted the MBE statute with certain amendments to become effective on July 1, 1990 (App. A-71-79).

On June 19, 1990, the District Court dismissed the Petitioner's Complaint for want of standing. During the pendency of Petitioner's appeal of that dismissal, the revisions to the Maryland MBE law had become effective, and the parties advanced their legal arguments on mootness, as well as their arguments on the standing issue to

the United States Court of Appeals for the Fourth Circuit.

On May 20, 1991, the Court of Appeals issued its opinion finding that the changes that had been made in 1990 to the Maryland MBE statute rendered this case moot. The Court reasoned that the case was moot because the statute challenged by the Association no longer existed and the Court did not have before it sufficient facts to determine whether "someone" had been injured by the "new" statute (App. A-12). The Court rejected sub silentio, Petitioner's suggestion that if it were concerned about possible mootness, the appropriate procedure under the very cases of this Court cited by the Respondent[1/] would be to remand the case to the District Court

---

1/ Diffenderfer v. Cent. Baptist Church, 404 U.S. 412, 415 (1972)(per curiam); Fusari v. Sternberg, 419 U.S. 379 (1975).

for further proceedings. Instead, the Court of Appeals, relying upon United States v. Munsingwear, 340 U.S. 36, 39 (1950), and the general practice referred to therein of dealing with cases mooted on appeal, vacated the judgment below and remanded the case to the District Court with a direction to dismiss.

IX

REASONS FOR ALLOWANCE OF THE WRIT

A. Certiorari Should Be Granted Because The Decision Of The Court Of Appeals Conflicts With Opinions Of This Court And Of Other Courts Of Appeals.

1. The Court Of Appeals Misapplied The Standards Set Forth In The Opinions Of This Court For Determining When Intervening Legislative Action Renders Moot A Constitutional Challenge To State Statutory Provisions And What Disposition Is Appropriate Upon A Finding Of Mootness.

This Court has said both that the burden of demonstrating that federal jurisdiction should abate because of mootness

"is a heavy one," and that voluntary cessation of alleged illegal conduct does not render a case moot. United States v. W.T. Grant Co., 345 U.S. 629, 632-633 (1953). Nevertheless, in County of Los Angeles v. Davis, 440 U.S. 625 (1979), this Court recognized that there may be circumstances in which a case becomes moot because interim relief or events have eradicated the effects of the violation complained of and there is no reasonable expectation that the alleged violation will recur. Davis, 440 U.S. at 631.

In the context of challenges to State statutory provisions, this Court held in City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982), that a controversy over certain language in a city ordinance was not rendered moot by the intervening repeal of that language, in circumstances

where the city had indicated an intention to reenact the objectionable language.

Similarly, in Johnson v. Board of Education of the City of Chicago, 457 U.S. 52, 54 (1982), this Court refused to find moot a controversy over the defendant school board's use of racial quotas, even in circumstances where the board had initially abandoned the challenged quotas before readopting them pursuant to a scheme of racial balancing approved under the terms of a consent degree, which the school board contended had "eliminated or reduced any discriminatory effects of the quotas." 457 U.S. at 54.

Thus, mootness is not shown under the decided cases simply because the circumstances originally before the Court may have changed. Rather, what is necessary for a finding of mootness is a showing by the moving party that a case has been

overtaken by events such that it has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." Diffenderfer v. Cent. Baptist Church, 404 U.S. 412, 414 (1972) (per curiam), quoting Hall v. Beals, 396 U.S. 45, 48 (1969).

Here, the controversy between the parties concerned whether the State had complied with the requisites of Croson before establishing a requirement that contractors on state projects agree to subcontract 10% of the work to subcontractors of particular races. The revised statute professed to have achieved compliance with Croson but in substance did no more than delete Alaskan Natives and Pacific Islanders from the definition of minority. The Court of Appeals concluded that this change produced a "new" law and

rendered moot the Petitioner's challenge to the "old" law, but the Court did not discuss in what way the revisions to the law demonstrated that the underlying controversy between the parties had abated. Instead, what the Court spoke of was the absence of information or evidence bearing on the operation of the new statute (App. A-12-13). When read in conjunction with its earlier comments, the Court appears to have said that this case is moot simply because the face of the Maryland statute now states that there has been an intervening attempt to comply with Croson, even though no evidence was introduced to support that claim, beyond the language of the statute itself.

The Court of Appeals' finding not only ignores the standard for mootness set out in this Court's cases, it also ignores the "heavy burden" placed upon the respondent

under Davis to adduce evidence to support its mootness claim, a burden that was not met by the Respondent here.

a. Other Circuits.

Further, the Court of Appeals' willingness to summarily render a factual determination on the basis of a facial review of statutory provisions is inconsistent with post-Croson precedent in other circuits suggesting that the adequacy of the factual predicate for race-conscious policies in public contracting needs to be adjudicated on the underlying facts rather than on assumptions as to the facial implications of the statute. See Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir.), cert. denied, 111 S. Ct. 516 (1990). Cone involved a challenge to a program on facts essentially similar to those at issue here, and essentially similar to the facts in Croson. The Eleventh Circuit held that

the District Court had improperly granted summary judgment to the plaintiff on the basis of a facial review of the statute, without looking behind the language to examine the operation of the law.

A recent decision in the Ninth Circuit concerned the asserted mootness caused by subsequent legislative amendment of an MBE statute. In Coral Construction Co. v. King County, No. 90-35066 (9th Cir. Aug. 8, 1991) (LEXIS 17784), the court held that, since the constitutionality of the original law had yet to be determined, it would remand the issue of mootness to the district court for consideration. Id. at 20, slip op. at 51.

b. Prior Decisions of This Court.

The Court of Appeals also misread established precedent of this Court bearing on the effect of intervening legislative changes. In finding the absence of record

evidence determinative of the mootness issue, the Court of Appeals appeared to be relying on language from this Court's opinion in Fusari, 419 U.S. at 387, which suggested that appellate review should not take place when the Court is "unable meaningfully to assess the issues" because of intervening changes (App. A-12).[2/] What the Court of Appeals failed to appreciate,

---

[2/] In Fusari, the plaintiff complained that delays in State eligibility determinations for unemployment compensation violated constitutional and statutory requirements. In the course of proceedings before this Court, the State subsequently revised and streamlined its administrative procedures with the result that, by the time of the Court's opinion, these revised procedures had been in effect for over six months. Noting that it was required to examine the then-current law and that "both the statutory and constitutional questions are significantly affected by the length of the period of deprivation of benefits," the Court found itself unable to rule on the revised administrative scheme, saying that it could "only speculate how the new system might operate." 419 U.S. at 388-389.

however, was that Fusari is not a mootness case in the nature of Davis or City of Mesquite. Indeed, the result in Fusari was not dismissal of the action as moot but remand for reconsideration in light of the intervening changes in law. 419 U.S. at 390.

Similarly, the Court of Appeals erred in relying upon Diffenderfer v. Central Baptist Church, supra, and Hall v. Beals, supra, as support for its mootness finding. In Diffenderfer the challenge was to a Florida statute authorizing a tax exemption for church property used as a commercial parking lot. In the course of the appeal, the Florida Legislature amended the statute to treat church property as tax exempt only if used predominately for religious purposes, thus adopting the plaintiff's position.

In Hall v. Beals, the plaintiffs' interest in challenging the State's six-month voting eligibility requirement was vitiated by legislative amendments reducing that requirement to two months -- a standard that the plaintiffs would have satisfied at the time they initiated the suit. In these circumstances, said the Court, the case had lost its status as a present, live controversy between the parties.

The common thread in these cases is that intervening legislative action made unnecessary or nondispositive resolution of the issue urged on the then-existing record. In contrast, where the issues in a plaintiff's complaint remain viable disputes, both legally and factually, notwithstanding intervening legislative action, the Court is still in a position to grant meaningful relief to the plaintiff by deciding the questions raised below.

In the instant case, the Petitioner's challenge to the Maryland MBE statute focused principally upon the language of three provisions of that statute: Sections 14-301 through 14-303. Petitioner's Complaint maintained that these provisions and their implementing regulations constituted a scheme of racial classification in state contracting activities such that a minimum of 10% of the dollar value of state procurement was to be targeted for award to MBE subcontractors through a program of mandatory compliance efforts by prime contractors on state projects.

Petitioner further asserted that under this Court's opinion in Croson, the Maryland MBE statute constituted impermissible racial discrimination because: 1) the history of the MBE statute indicated that the program was enacted for the purpose of increasing MBE participation in state

contracting; 2) there was insufficient evidence of prior discrimination in State contracting activities to justify imposition of the program under federal law, and 3) the program was not narrowly tailored to correct identified discrimination because selection of the 10% target figure was wholly arbitrary, the program was unlimited in duration, the program included within the definition of MBEs individuals (Alaskan Natives, Pacific Islanders and American Indians) who could not be shown to have even been available in significant numbers to participate in Maryland State contracting, and the State had failed to give genuine consideration to non-race-conscious or less intrusive remedies for discrimination -- examples of which were included in Petitioner's Complaint -- before enacting its MBE program.

When the Maryland General Assembly considered amendments to its MBE legislation in 1990, it repealed and reenacted the statute, making only one change relevant to Petitioner's claims concerning the language of §§ 14-301 through 14-303 of the MBE statute: the deletion of Alaskan Natives and Pacific Islanders from the list of those qualified to be MBEs. Otherwise, each of the provisions in §§ 14-301 through 14-303 cited by Petitioner's Complaint was reenacted without change and a 10% subcontracting target continued to exist for the participation of Hispanics, Blacks, Asians and American Indians.

Thus, the allegedly unconstitutional racial preferences originally complained of by Petitioner continued unabated, except that certain racial minorities could no longer qualify for MBE status, and the scheme of mandatory contractor compliance

originally complained of continued exactly as it had existed before.

Further, even if the Court of Appeals entertained some genuine doubt as to whether the issues in Petitioner's original lawsuit should be thought to have survived the intervening changes by the Maryland Legislature, the appropriate procedure under the opinions of this Court would have been to remand the case for possible amendment of the Complaint, not to dismiss the action. As this Court recently said in Lewis v. Continental Bank Corp., 494 U.S. 472, 110 S. Ct. 1249, 1256 (1990):

> [I]n instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.

Given the Court of Appeals' express recognition that it did not "have enough facts before [it] in this case to evaluate the new statute in light of Croson" (App. A-13), one would have thought that the Court would have been inclined to remand the case even independent of this well-established Supreme Court authority.[3/]

Instead the Court of Appeals vacated the District Court's order and remanded for dismissal, relying upon the line of cases headed by United States v. Munsingwear, 340 U.S. 36, 39 (1950), wherein this Court reversed and vacated the judgment below on the ground of mootness, directing that the complaint be dismissed. However, Munsingwear is inapposite because of the absence

---

3/ In addition to the result in Fusari, Petitioner's brief to the Court of appeals directed it as well to the result in Diffenderfer, 404 U.S. at 415 (remanding with leave to amend to show that the "repealed statute retains some continuing force").

in this case of mootness. Moreover, given that the argument on mootness arises in this case in the context of intervening legislative changes, even the underlying philosophy of Munsingwear is inconsistent with the Court of Appeals' decision to vacate the District Court's order on standing but nevertheless "address the issue of standing in order to guide subsequent litigation" (App. A-14) (whereupon the Court of Appeals essentially adopted the lower court's standing analysis).

Thus, Munsingwear concerned itself with fairness to the parties to a moot controversy and the need to vacate an existing judgment in order to avoid needlessly prejudicing the parties' future rights and interests:

> That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that proce-

> dure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

340 U.S. at 40.

In contrast to the result in Munsingwear, the Court of Appeals' action here has placed the present case in a posture in which the Court has, on the one hand, ordered Petitioner's case dismissed as moot, and on the other, effectively precluded Petitioner from filing a new complaint against the modified MBE statute.[4/]

[4/] As we discuss below, the Court of Appeals found that a conflict of interest among its members and a lack of demonstrated harm prevented the Petitioner from having standing to challenge the MBE statute. Whether that finding is viewed as persuasive dicta, as a matter governed by stare decisis or as the law of the case, the District Court should be expected to apply the Court of Appeals' analysis to dismiss Petitioner's Complaint should it now file against the amended statute. See 1.B Moore's Federal
(continued...)

Moreover, the automatic rule of dismissal that the Court of Appeals has imposed here under Munsingwear would, in the context of constitutional challenges to State legislation, both under this Court's Croson opinion and in other circumstances, undermine the important role served by "private attorneys general" in advancing the interests embodied in federal civil rights statutes[5/] by subjecting plaintiffs to dismissal any time that a legislative

---

[4/](...continued)
Practice ¶ 0.402[2] at 42-45 (2d ed. 1991).

[5/] In its recent opinion in Texas State Teachers Ass'n v. Garland Indep. School Dist., ___ U.S. ___, 109 S. Ct. 1486, 1494 (1989), this Court reaffirmed the important role served by the presence of private attorneys general in the prosecution of civil rights litigation.

body purports to review and make saving amendments to challenged legislation.[6/]

As a result, states and municipalities defending statutes or ordinances from constitutional attack will be in a position to litigate through the point of resolution

---

[6/] The rule of dismissal adopted by the Court of Appeals will also do substantial harm to the purposes served by the attorneys' fees provisions of 42 U.S.C. § 1988, by preventing a plaintiff in these circumstances from contending that it should be viewed as a "prevailing party." Thus, while a civil rights plaintiff may be entitled to recover fees where repeal of a legislative provision effectively constitutes capitulation by the defendant, see Associated Builders & Contractors of La. v. Orleans Parish School Bd., 919 F.2d 374 (5th Cir. 1990), the mandatory dismissal of a plaintiff's complaint, where a state or municipality opts to revise and defend its statute, will make it virtually impossible for a plaintiff to make the showing necessary for recovery of fees, i.e., that the intervening legislative actions have changed "the legal relationship between itself and the defendant," Hewitt v. Helms, 402 U.S. 755, 760-761 (1987), such that it may be viewed to be a prevailing party.

by the trial court yet subsequently defeat federal jurisdiction by the simple expedient of revising the face of the legislation during the pendency of appeal. A plaintiff's case would then be found moot and its complaint dismissed with the result that the plaintiff would be required to retrace its steps if it wished to obtain the very relief that was sought in the original complaint and not realized by virtue of the intervening state action. Such a wholesale grant to public defendants of the ability to manipulate federal jurisdiction should not be sanctioned by this Court.

B. Certiorari Should Be Granted Because In Ruling That The Association Lacked Standing To Challenge The Constitutionality Of A Statute Because Some Of Its Members Stood To Benefit From The Statute, The Court Decided An Important Question Of Federal Law That Has Not Been, And Should Be, Decided By This Court.

In ruling that as a matter of law the Association lacked standing to sue because some of its members were minority contractors who stood to benefit from the challenged legislation, the Court of Appeals has decided an important question of federal law which has not been, but should be, decided by this Court. The Court of Appeals has rendered a decision that means that no large organization can maintain standing to sue on behalf of its members because there will always be someone with a conflict. Moreover, the Court has made this ruling on a point on which neither party presented evidence. The trial court did not rule on it.

In Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), this Court set out a three-part test governing representational standing for organizations.[7/] Relying upon its vision of Hunt, the Court of Appeals concluded in the instant case that the Petitioner failed to meet parts 1 and 3 of the test and set out its reasoning on the matter "in order to guide subsequent litigation."

The Court of Appeals erroneously found that there were "actual" conflicts of interest among the members of the Petitioner such that under the third prong of the

---

[7/] Under Hunt, an organization has representational standing when (1) its own members would have standing to sue in their own right; (2) the interests of the organization seek to protect one germane to the organization's purpose; and (3) neither the claim nor the relief sought require the participation of individual members in the lawsuit. Id. at 343.

Hunt test, it was necessary for Petitioner's members to come forward individually in this matter (App. A-27). In so doing, the Court relied primarily upon the opinion of the Eighth Circuit in Associated General Contractors of North Dakota v. Otter Tail Power Co., 611 F.2d 684, 691 (8th Cir. 1979), where associational standing was denied in the context of a Sherman Act challenge to a private construction agreement limiting participation on the project to unionized subcontractors. Because the plaintiff association in Otter Tail was composed of both union and nonunion contractors, the Eighth Circuit found their status and interests too diverse and the possibility of conflict too obvious to allow the association to litigate the claims of its members. The Court noted in the latter regard that some of the association's contractor members would not, or

could not, work on the project, while others would participate and would stand to profit from such participation. Id. at 690-691.

The rationale of Otter Tail is in conflict with relevant opinions in other Circuits. For example, in National Collegiate Athletic Association v. Califano, 622 F.2d 1382, 1391-92 (10th Cir. 1980), the Court examined the issue of associational standing in the context of an athletic association's challenge to government regulations designed to foster sexual equality of opportunity in intercollegiate sports programs. The NCAA's standing to sue under Hunt was questioned because, inter alia, "[m]any of the colleges who belong to the NCAA also belong to a women's intercollegiate sports association, the AIAW, which is on the other side of the litigation." 622 F.2d at 1391. The Tenth

Circuit resolved the issue by finding that the association had standing absent a showing that a majority of its members opposed the objective of the lawsuit. In language of particular relevance here, the Court rejected the notion that the members' differing views of the issue required their individual participation in the lawsuit, stating:

> The appellees have contended that this lawsuit requires the individual participation of the members of the NCAA. Such an objection, if well taken, defeats standing of an association. Warth v. Seldin, 422 U.S. at 515-516. However, the contention is not well taken here. The NCAA must prove facts conferring standing with respect to at least one of its members (cf. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 114 (1979)), but otherwise the case presents issues of law common to all members. No damages are sought for the individual members. The NCAA asks for declaratory and injunctive relief, and "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association

actually injured." Warth v. Seldin, 422 U.S. at 515; cf. Hunt v. Washington Apple Advertising Comm'n, 432 U.S. at 344.

Indeed, the language of the Tenth Circuit in NCAA v. Califano anticipated the holding of this Court in United Auto Workers Union v. Brock, 477 U.S. 274 (1986). In Brock, the plaintiff union sought declaratory and injunctive relief to bar the implementation of a Department of Labor regulation which the union claimed unlawfully penalized those of its members who were applicants for certain supplemental unemployment insurance benefits under the Trade Act of 1974. The union alleged that the Department of Labor's policy of not crediting employees for eligibility purposes with time spent by them in military service was inconsistent with the mandate of veterans' rights legislation and resulted, in some cases, in the erroneous denial of members' claims.

The Court of Appeals had dismissed the case, saying that the union was not an appropriate representative because union members had differing interests and each of the adversely affected members presented an individualized claim that had to be dealt with separately. 746 F.2d 839, 842 (D.C. Cir. 1984). This Court reversed, stating:

> [T]he Court of Appeals misconstrued the nature of petitioner's claims. Neither these claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved UAW member. The suit raises a pure question of law: whether the Secretary properly interpreted the Trade Act's TRA eligibility provisions.

This Court went on in UAW v. Brock to reject the Secretary of Labor's suggestion that it reconsider Hunt and the principles of associational standing set out there. Specifically, the Secretary had urged the Court to reject associational standing in cases where there is no guarantee that the

associational plaintiff adequately represents the interests of all of its membership. This Court declined the invitation in language that has been interpreted to mean that mere diversity of member interests is insufficient to destroy associational standing:[8/]

> We are not prepared to dismiss out of hand the Secretary's concern that associations allowed to proceed under Hunt will not always be able to represent adequately the interests of all their injured members. Should an association be deficient in this regard, a judgment won against it might not preclude subsequent claims by the association's members without offending due process principles. And were we presented with evidence that such a problem existed

---

8/ See Nat'l Maritime Union of America v. Commander, Military Sealift Command, 824 F.2d 1228, 1233 (D.C. Cir. 1987) ("We conclude for a number of reasons that associational standing does not necessarily depend upon harmony of member interests. The first of these reasons is the very good one that we think the Supreme Court has decided the question," citing Brock).

> either here or in cases of this type, we would have to consider how it might be alleviated. However, the Secretary has given us absolutely no reason to doubt the ability of the UAW to proceed here on behalf of its aggrieved members, and his presentation has fallen far short of meeting the heavy burden of persuading us to abandon settled principles of associational standing.

477 U.S. at 290 (citations omitted).

In light of this Court's holding in Brock, the Court of Appeals' willingness to nevertheless follow the earlier opinion in Otter Tail underscores the disagreement in the circuits as to the application of the third prong of the Hunt test in circumstances where the individual interests of association members may be viewed as divergent.[9/] See also Mich. Road Builders

---

[9/] The Fourth, Seventh and Eighth Circuits have adopted the position that harmony of member interests is required for associational standing. See, in addition to Otter Tail and the opinion below, Calvin v. Conlisk, (continued...)

Ass'n v. Blanchard, 761 F. Supp. 1303, 1312 (W.D. Mich. 1991) (association which had previously litigated the constitutionality of MBE statute before this Court now held to lack standing because it admits MBEs to membership).

Moreover, strict application of the view espoused by the Fourth Circuit will severely hamper the proper assertion of associational standing by many associations who are composed of members drawn from a variety of racial, social and economic backgrounds, but who nevertheless share in common certain interests furthered by

---

[2/](...continued)
520 F.2d 1, 5 (7th Cir. 1975). The Sixth, Tenth and District of Columbia Circuits have taken a contrary position. See Gillis v. U.S. Dep't of Health and Human Services, 759 F.2d 565, 572-573 (6th Cir. 1985); NCAA v. Califano, supra; and Sealift Command, supra, 824 F.2d at 1231-38.

membership in the association.[10/] Indeed, in the instant case the Court of Appeals based its conflict-of-interest finding solely on the fact that the Petitioner has minority members who qualify for MBE status under the Maryland statute and presumably benefit from its operation.[11/] But there is no reason to assume, as did the Court of Appeals, that simply because a statute might work generally to the economic advan-

---

[10/] Cf. Gillis, supra, 759 F.2d at 572-573 ("carried to its logical extreme, evaluation of representational standing in terms of the adverseness of remote interests of discrete members would seriously undermine the ability of individuals through organizations to achieve public interest objectives through the legal system").

[11/] No evidence was introduced on this point beyond the names of the Petitioner's members who were MBEs. To the extent that specific evidence was sought in discovery concerning the reaction of MBE members to Petitioner's institution of its lawsuit, the record showed only that no MBE member had raised an objection to the suit.

tage of an MBE member of Petitioner that such a member would necessarily favor continuation of an unconstitutional program of race-based discrimination. Cf. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (minorities may oppose remedial programs on the practical ground that they promote stereotypical views of minorities as unable to achieve success without special governmental assistance).

For all of these reasons, Petitioner respectfully submits that the Court below erred in its application of the third prong of the Hunt test, and has created a standard for harmony in member interests that will work great mischief and injustice as this and other associations seek judicial relief to further the legitimate common interests of their injured members. Under the standard that the Court of Appeals has articulated, it is extremely doubtful that

any but the most restrictive in admission to membership and narrowly focused of associations could survive a challenge to its associational standing.[12/]

We respectfully urge this Court, therefore, to review and reverse the analysis of the Court of Appeals on this important point of federal standing law.

12/ Frequent litigants before this Court and others would clearly be in jeopardy of losing the right to initiate even injunctive or declaratory actions relevant to their members' associational interests. Labor unions would be particularly vulnerable because of the democratic principles under which they must operate. Public interest groups such as the Sierra Club will find that they may not challenge regulations or projects of benefit to the business interests of some of their members and civil rights proponents such as the National Association for the Advancement of Colored People may find that a multi-racial membership disqualifies them from asserting claims that are thought inconsistent with the interests of portions of their memberships.

C. Certiorari Should Be Granted Because The Court of Appeals Misapplied The Opinions Of This Court Governing Summary Judgment And Rendered A Decision In Conflict With That Of Another Circuit.

The Court of Appeals held that the Respondent was entitled to summary judgment under Rule 56 of the Federal Rules of Civil Procedure because the Association had not come forward with evidence of harm sufficient to confer standing upon it. In so doing, the Court refused to consider the factual averments contained in a letter written by Association member McLean Construction Co. (A-106) that was incorporated into the deposition testimony of Petitioner's Executive Director and offered by Respondent as part of its summary judgment papers. Those averments were sufficient to establish the existence of a material issue of fact as to the economic harm done to Association members by the requirements of the Maryland MBE program.

The Court of Appeals refused to consider the McLean letter because it considered it to be inadmissible hearsay, even though the Respondent had offered the letter and did not object to its consideration.[13/] The Court's position was directly contrary to the statement of this Court in Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986), that "Rule 56 does not require the non-moving party [to] produce evidence in a form that would be admissible at trial."

Further, the Court of Appeals' additional finding that the McLean letter presented only "passing" and insufficient evidence of harm to its economic interests

---

13/ Inadmissible hearsay evidence may be admitted where it is not objected to and may be considered when determining the facts. Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 37-38 (D.C. Cir. 1987); Diaz v. United States, 233 U.S. 442, 450 (1912).

is simply wrong and ignores the instruction of this Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), that in the context of a motion for summary judgment, it must draw "all justifiable inferences in favor of the nonmovant." Plainly, the contents of the McLean letter, whether they constituted or were capable of being "reduced to admissible evidence," Celotex Corp., supra at 317, when coupled with the reasonable inferences to be drawn from the presence of the elaborate administrative demands placed upon bidding contractors by the regulations implementing the Maryland MBE program (App. A-83-88), were more than sufficient under the opinions of this Court to survive the Respondent's Motion for Summary Judgment.

Further, the Fourth Circuit's refusal to consider as significant the economic impact of participation in the Maryland MBE

program conflicts with the Ninth Circuit's recent decision in Coral Construction, which noted that the contractor plaintiff had standing to question a gender-based preference even though the contractor had not lost the contract in question as the result of application of the preference. "The question is whether Coral Construction has alleged a more certain injury than a potential lost bid." LEXIS 17784 at 22, slip op. at 57. The court distinguished the holding in S.J. Groves & Sons Co. v. Fulton County, 920 F.2d 752, 758 (11th Cir.), cert. denied, 111 S. Ct. 2274 (1991), that there was no injury where a set-aside applied to all bidders equally. Rather, the Ninth Circuit reasoned,

> As a result of the objectively unequal bidding process under the preference method of awarding contracts, an injury results not only when Coral Construction actually loses a bid, but every time the company simply places a bid. Indeed, Coral Construction

> suffers injury for standing purposes even when it is the successful bidder, as it must adjust its bid to reflect the fixed five-percent adjustment given to WBEs. Each bid placed by the company undoubtedly reflects the unequal competition.

LEXIS 17784 at 23, slip op. at 59.

Thus, unlike the Fourth Circuit, the Ninth Circuit has recognized the economic injury that is implicit in participation in a program of racial preferences.

D. Certiorari Should Be Granted Because The Ruling That The Association Lacked Standing To Challenge The MBE Statute Because Its Members Had Not Suffered Noneconomic Harm Conflicts With Opinions Of This Court, And In Other Circuits.

The Court of Appeals found that, despite its assertions to the contrary, Petitioner had not adduced evidence that its members had been "harmed" in any way by the Maryland MBE statute. In so doing, the Court discounted the Association's claims of non-economic harm, despite the fact that

Petitioner sought declaratory and injunctive relief only,[14] and repeatedly asserted that it was entitled to ground its associational standing on the fact that its members suffered a loss of their liberty interests. Petitioner asserted in that regard that its members were compelled by the State MBE law -- a law beyond the power of the State to constitutionally maintain -- to engage in racial discrimination in subcontracting if they wished to do business with the State.[15] Indeed, Peti-

---

[14] Petitioner was precluded by this Court's opinion in Will v. Mich. Dep't of State Police, 491 U.S. 58, 109 S. Ct. 2304 (1989), from seeking money damages in this proceeding, in any event.

[15] As evidenced by the Petitioner's Articles of Incorporation and By-Laws, it is an association governed by contractor members who "contract or subcontract the construction of highways, bridges, airports, tunnels and other transportation facilities in Maryland . . ." Petitioner's contractor members are, therefore, (continued...)

tioner's members are and were the individuals who were "directly affected by the laws and practices against whom their complaints are directed." School Dist. of Abington Township v. Schempp, 374 U.S. 203, 224 n.9 (1963). Petitioner further claimed that its members were subject to the distinct threat of harm because their participation in the assertedly unlawful scheme of racial classification embodied in the State's MBE subcontracting program subjected Plaintiff's members to potential liability for civil rights claims brought by nonminority subcontractors who thought themselves the victims of racial discrimination. See Lugar v. Edmonson Oil Co., 457 U.S. 922, 933-934 (1982) (private party found to be engaged in state-required

---

15/ (...continued)
dependent on contracts covered by the Maryland MBE statute.

discrimination will be held answerable in damages).

Although the Court of Appeals declined to address the case, Petitioner also pointed out that the position of its members in the instant matter was identical to that of the contractor members in Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), where, in a pre-Hunt decision, the Third Circuit held that contractor members of an association had standing to challenge the constitutionality of the so-called "Philadelphia Plan," an Executive Order obligating bidders on federal highway construction projects to commit themselves to meet certain minority hiring goals. In language of particular moment here, the Third Circuit noted that "the Contractor plaintiffs who as bidders are directly impacted

by the requirement that they agree in their bid to comply with the Plan, clearly have standing." 442 F.2d at 166.

For all of these reasons, Petitioner asserts that it plainly has standing for purposes of challenging the maintenance of the MBE statute. Other cases are instructive. For example, in Doe v. Bolton, 410 U.S. 179, 188 (1972), this Court found that, even in the absence of a threatened prosecution, a Georgia physician had standing to challenge the constitutionality of the State's criminal abortion statutes because the physician "is the one against whom these criminal statutes operate." This rationale was recognized in the civil context in Singleton v. Wulff, 428 U.S. 106, 113 (1976), where this Court assumed, without deciding, that doctors who sought a declaratory judgment invalidating a statute prohibiting certain abortions may

be viewed as asserting their own constitutional right to practice medicine free from interference by the state. Cf. Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873, 875 (5th Cir. 1975) (doctor had personal stake in challenging abortion statute to secure his right "to practice medicine free from the imposition of arbitrary restraints").

In Lake Carriers' Association v. MacMullen, 406 U.S. 498 (1972), this Court found that an association and its members had standing to challenge the legality of a state sewage control statute, even in light of a moratorium on enforcement of the statute, where the threat of future enforcement coupled with the state's then-present efforts to encourage voluntary compliance created a concrete controversy over the statute's validity.

Also, in Pennell v. City of San Jose, ___ U.S. ___, 108 S. Ct. 849 (1988), this Court held that an association of landlords had standing to challenge the City's rent control ordinance based upon the fact that the association's members owned property subject to the ordinance. In the face of a contention that the association lacked standing because it had not shown that its members rented to so-called "hardship tenants" who were the beneficiaries of the ordinance, this Court found a sufficient threat of actual injury in the fact that the ordinance would be enforced against association members with a likely reduction in the amount chargeable as rent.

In the instant case the contractor members of the Petitioner, against whom the statute is admittedly enforced, assert that the State of Maryland has no right, under the principles set out in Croson, to

infringe their business freedoms and expose them to potential liability by requiring that they search out subcontractors based on race. They seek only a declaration that the State may not lawfully require such conduct of them and, because it may not, an injunction preventing the State from maintaining the requirement, absent satisfaction of the prerequisites established in Croson. In these circumstances, where the focus is not upon monies lost by an individual contractor member, but rather the constitutionality of the underlying statutory scheme, the Petitioner is not only a proper plaintiff, it is the logical and appropriate party to advance the general interests of its members. Cf. New York State Club Ass'n v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 2232 n.4 (1988) (consortium of private clubs and associations held to have standing to attack

facial constitutionality of law prohibiting discrimination in such clubs and associations; necessary proof may be presented in a group context); United Auto Workers v. Brock, 477 U.S. at 289 (associational representation permits access to greater capital and expertise of benefit to both the association's members and the judicial system).

For all these reasons, the Court of Appeals' insistence that Petitioner demonstrate that the Maryland MBE statute has caused one or more of its members to lose money fails to conform to the relevant opinions of this Court and in other circuits. Petitioner has demonstrated its standing under the first prong of the Hunt test, and this Court should so find.

X

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue and the judgment of the Court of Appeals should be reversed and remanded with instructions to permit Petitioner to amend its Complaint to attack the current version of the Maryland MBE statute and to proceed to an expedited trial on the merits.

Respectfully submitted,

Leslie Robert Stellman
Counsel of Record for Petitioner
John W. Kyle
LITTLER, MENDELSON, FASTIFF & TICHY
The World Trade Center, Suite 1653
Baltimore, Maryland 21202-3005

Walter H. Ryland
WILLIAMS MULLEN CHRISTIAN & DOBBINS
Two James Center
1021 East Carey Street
Richmond, Virginia 23210-1320
(804) 643-1991

146.804